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STREAMLINING NEPA—AN ENVIRONMENTAL SUCCESS STORY

*Nicholas C. Yost**

The good news about the National Environmental Policy Act (NEPA) is no news. In 1980 there were no legislative amendments to NEPA. NEPA was not targeted in the Heritage Foundation's report. Nobody made any campaign promises to gut NEPA. NEPA is on nobody's hit list.

This happy turn of events is an indication of NEPA's success. It continues to operate in a manner recognized as beneficial by the various interests that deal with NEPA—business, environmentalists, state and local governments, and federal agencies.

Shortly after President Nixon signed NEPA on January 1, 1970, as his first official act of the new decade, he appointed Russell Train as Chairman of the Council on Environmental Quality (CEQ)—the Council created by NEPA. Train soon issued the guidelines which with modification and improvement served NEPA enormously well in its opening years.

NEPA litigation ensued, unanticipated by the Act's authors but crucial to its success. Able lawyers for environmental plaintiffs brought lawsuits challenging the adequacy of environmental impact statements, and able lawyers for government and business applicants responded with advice to include everything in the statements. This legal advice, although sound, encouraged the preparation of fat, albeit complete, Environmental Impact Statements (EIS's) which ceased to be usable by the decisionmakers or members of the public who were their intended readers. Business meanwhile became extraordinarily concerned over what it perceived as the inordinate time necessary to complete the NEPA process.

At this stage we at CEQ, then under the Chairmanship of Charles

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Warren, undertook an effort to streamline implementation of the Act. We had three goals in mind: (1) to reduce paperwork; (2) to reduce delay; and (3) to see that the process resulted in better decision making.

I want briefly to describe the process the CEQ followed in adopting the new regulations, because that open and receptive process had much to do with the successful outcome. We started with public hearings actively involving NEPA's critics as well as its friends. We asked the U.S. Chamber of Commerce to coordinate the presentation of the views of American business; the Building and Construction Trades Department of the AFL-CIO to do so for labor; and the Natural Resources Defense Council to do the same for environmental groups. We also obtained the participation of state and local governments, the scientific community, and the public generally.

Based on the public hearings and written comments, we developed a thirty-eight page questionnaire. It reflected not CEQ's views but the views of all who testified, and included the problems they identified and the solutions they suggested. We distributed this questionnaire as widely as possible. We received hundreds of responses which broadly and fairly represented the spectrum of interests involved with NEPA. We tabulated these questionnaires not only to find good ideas, but also to see where consensus existed among those who deal with the NEPA process. If both business and environmentalists agreed that something was a good idea, the chances were that it was a good idea. Finally, we met with all federal agencies to discuss their experiences and suggestions for improving the NEPA process.

Based on the information we received, CEQ drafted proposed regulations which were placed into interagency review. The review process was a laborious one, involving six months of comments, meetings, and negotiations. We then published the proposed regulations in the Federal Register and began another half-year of public review. During this period we again took the initiative to meet with every critic of NEPA or its implementation. If a state governor had harsh words to say, we went to visit him and hear what the problems were. If somebody wrote a critical article in the trade press, we called him. On the Hill, oversight committee staffs were asked to let us know of any complaints they received. We called on all those who complained, listened to what they had to say, and either changed the draft regulations to reflect their concerns or explained why we could not.

Finally on November 29, 1978, the Council published the final

NEPA regulations in the Federal Register. The regulations became effective government-wide on July 30, 1979, and now nearly all agencies have implementing procedures in place.

With the regulations, we at CEQ concluded that we had achieved our three goals. Every major group in the United States concerned with implementation of NEPA told the Council that they supported the new regulations. The United States Chamber of Commerce "congratulated" the Council, finding the regulations "a significant improvement over prior EIS guidelines." The National Governors' Association commended the Council for "a job well done." The Natural Resources Defense Council wrote to "welcome" the regulations as an "important improvement" over the guidelines. The National Wildlife Federation stated that the regulations "cut the wheat from the chaff" and will make the process "much better" for citizens and "for better decisions as well."

All now agree that it is good policy to study the environmental consequences before you act—to look before you leap environmentally—and all are basically satisfied with the procedures for achieving that end. That is the basic success of NEPA. NEPA's success emphasizes the importance of basic agreement on the worth of an environmental law and its implementing regulations among at least the responsible members of the various constituencies that must live and work with the law.

What were the provisions of the NEPA regulations that led to the present satisfaction among the interests affected by the Act and its implementation? Certain concepts were recognized as improvements by all concerned. In other respects, tradeoffs were involved. The business community was most interested in reducing delay and in making the system more responsive to the needs of applicants for permits. The environmental community's primary concern was to see that the process resulted in greater environmental sensitivity in decision making. These concerns did not conflict, and both shaped the final regulations.

The most important provisions should be described in greater detail:

1. *Shorter Documents.* The regulations reduce the length of EIS's to a normal 150 pages or less and a maximum of 300 pages for complex proposals.

2. *Scoping.* The new regulations ensure the early participation of those involved in the process and the identification of important issues. Significant issues will be given adequate study, but lengthy analysis of insignificant issues will be avoided. The

result will be both a better, more rounded draft EIS and a reduction in delay.

3. *Interagency Cooperation.* The regulations emphasize inter-agency cooperation before the EIS is drafted rather than adversary comments on a completed document. A "cooperating agency" will help write the statement in the first place. This will produce a better draft document and reduce the pressure for delays later on.

4. *Interdisciplinary Preparation.* The regulations place new emphasis on the statutory command to "utilize a systematic interdisciplinary approach" to decision making.

5. *The Regulations Emphasize Options Among Alternatives.* This avoids an extensive accumulation of background material that is useful neither to the decisionmakers nor the public.

6. *Streamlining the Process.* The regulations streamline the NEPA process in other ways as well:

a. *Time Limits.* For the first time, the regulations mandate time limits on the NEPA process at the request of the applicant. This was the single provision most attractive to the business community.

b. *Making the Permit Process Move Smoothly.* Several provisions are designed to make the permit process move smoothly.

i. *Identify Permits.* The lead agency must identify other permits and reviews that will be necessary before a project is to proceed.

ii. *Agencies Must Develop Procedures to Aid Applicants.* Applicants to the government often have difficulty in knowing what is expected of them with respect to environmental requirements. The NEPA regulations require all agencies to develop procedures to assist applicants.

iii. *Reviews to Run Concurrently Rather Than Consecutively.* NEPA is the most pervasive environmental law. In one of the most important sets of provisions, the regulations require using the EIS to rope together all the different reviews mandated by law, thus ensuring that the reviews take place at the same time.

iv. *Information and Mitigation Identified Early.* The regulations use the EIS to require other permitting agencies to identify the information they will need to pass upon the project and the mitigation measures that will be necessary for the approval of the project. Thus,

this information will be developed concurrently rather than consecutively. When the EIS is complete, all agencies with permit or review authority should be able to take the appropriate action without further study or delay.

v. *Eliminating Duplication*. The regulations require federal agencies to work with appropriate state or local agencies as joint lead agencies to prepare one document that satisfies both federal and state requirements. Similarly, duplication among federal agencies is avoided by allowing one agency, with appropriate safeguards, to "adopt" the work of another.

7. *Better Decisions*. The original congressional purpose in enacting NEPA was to ensure that all federal agencies include environmental considerations in their decision making. Often in the implementation of NEPA this purpose has been forgotten and interest has focused more on the adequacy of a document than on whether or not the action should go forward. The regulations attempt to redress this misemphasis. The principal device we use to determine sensitivity to environmental considerations is the record of decision. The decisionmaker is required to record the environmentally preferable alternative (or alternatives) and then describe how this alternative was balanced with other "essential considerations of national policy" in making the decision.

The regulations do not mandate the choice of the environmentally preferable alternative in every case. Instead, they require that the decisionmaker at least think about proceeding in what the EIS has shown to be an environmentally sensitive manner rather than in an environmentally insensitive manner. Our hope is that the decisionmaker will be encouraged to make more environmentally sensitive decisions. Of course, the decisionmaker's decision remains his or hers to make subject to judicial review for compliance with the substantive and procedural requirements of sections 101 and 102 of NEPA.

8. *Follow-up*. In the past the NEPA process ended with the EIS or the decision. We want to see that the information collected in the EIS is reflected in the decision, and that the decision made about environmentally protective measures is, in fact, implemented. Consequently, new emphasis will be placed on mitigation and monitoring and, where appropriate, on reports outlining the progress of such measures.

In brief, the changes to the regulations were designed to reflect the experiences of several years operation under NEPA and to respond to the criticisms that each of the affected interest groups had with the process as it had been operating.

CEQ maintains a computer inventory of all NEPA litigation ever initiated. In our Eleventh Annual Report on Environmental Quality the statistics were made public. Of the 139 lawsuits filed under NEPA in 1979, twelve resulted in the issuance of injunctions. Of the thirteen cases involving energy projects, only one resulted in an injunction.

The 1979 statistics are fully in line with the cumulative statistics since NEPA was enacted in 1970. During that ten-year period, 1,191 NEPA lawsuits were filed. This figure represents less than 10 percent of all federal proposals for which an EIS was required, let alone the far larger number of cases where NEPA's requirements were satisfied with an environmental assessment. During those ten years, courts issued NEPA-related injunctions in 229 cases. Of the 116 cases involving specific energy projects, injunctions were issued in eighteen cases—an average of less than two cases a year. Thus, while NEPA litigation has made the whole NEPA process credible, it has not resulted in significant delays to worthy projects, including energy projects.

Environmental laws can be made to work and work well. They work best when those responsible for their implementation recognize: first, that they don't have all the answers; and second, that each interested constituency has experience and expertise which can both improve the operation and secure the acceptance of laws which are intended to serve all the public.